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FILED

JUL 23 2003

No. 02-1547

In The

# Supreme Court of the United States

KIP R. RAMSEY, d/b/a TIIN-MA LOGGING CO.;
TIIN-MA LOGGING CO.,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITIONER'S REPLY BRIEF

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## STATEMENT

The Brief in Opposition mischaracterizes and misquotes a portion of the Petitioner's argument, fails to discuss the entire record, and fails to adequately discuss this Court's holding in *Chickasaw Nation v. United States*, 534 U.S. 84 (2001). This reply responds to those issues.

## ARGUMENT

### I. PETITIONER DID NOT "REPOSITION" THE LANGUAGE OF PARAGRAPH 1 OF THE YAKIMA TREATY.

At Pages 8 and 15 of the Reply Brief, the United States asserts that Petitioner added the words "free of taxes and fees" to the language of Article III, implying that counsel was altering the language of Article III, Paragraph 1, to mislead the Court. This is not the case. The United States references a portion of Petitioner's description of the proceedings below from Page 8 of the Petition (in which Petitioner is describing the proceedings below, not making any argument), placing the entire statement in quotes as though Petitioner had done so as well. In fact, Petitioner was simply stating that it was his position below and here, that the language of Article III, Paragraph 1, entitled him to use of the highways free from taxes and fees. The language the United States has placed all in quotes, at page 8 of its Brief, is as follows:

> Petitioner seeks to avoid the conclusion required by the plain text of the treaty by repositioning its language and arguing that it provides *"him the right 'to travel the public highways' 'in common with citizens of the United States' free of taxes and fees."*

Petitioner's actual statement was that Article III, Paragraph 1, of the Treaty reserved to him the right "to travel the public highways" "in common with citizens of the territory" free of taxes and fees. The portion of this statement in quotes is taken directly from the Treaty. The words "free of taxes and fees" are simply part of

Petitioner's statement of position and, as the Court can plainly see by Petitioner's careful quotation of the actual Treaty language, were not used to "recant or alter" the Treaty language to include any reference to taxes or taxation.

The issue before this Court, as it has been in all of the cases involving this issue, is whether the Circuit improperly refused to apply the canons of construction to the *actual words* of Article III, Paragraph 1, specifically "the right . . . to travel upon all public highways" to determine if the Indians understood it to provide an exemption from these taxes.

## II. PETITIONER DOES NOT SEEK A TOTALLY "UNRESTRICTED" RIGHT TO TRAVEL ON THE PUBLIC HIGHWAYS.

At Pages 12 and 13 of the Brief in Opposition, the United States asserts that Petitioner seeks an "unrestricted right" (quotes by the United States) *and* an exemption from taxes. This has never been Petitioner's position and the United States' assertion to the contrary is simply wrong. The United States claims Petitioner made this claim for an "unrestricted right" at Page 8 of the Petition. Those words do not even appear on Page 8 of the Petition.

In fact, at the bottom of Page 7 and the top of Page 8 of the Petition, Petitioner states the following:

> There is no contention that the Treaty exempts Ramsey from following all of the rules of the road, including weight restrictions, speed, safety, etc.
>
> Petition Pages 7 and 8.

Further, the District Court in the case of *Cree v. Flores*, 955 F.Supp. 1229 (E.D.Wash 1997), (found in the appendix at Pages 83a-182a), specifically held that Petitioner was subject to numerous State highway regulations, provided that he did not have to pay a fee. For instance, see the *Flores* ruling at appendix 178a-179a, findings 79, 83 and 84 reflect exactly that.

Petitioner specifically conceded, in both the *Flores* case and this case, that non-discriminatory highway regulatory statutes were indeed applicable to him, provided that he was not charged a fee in connection with them. This was done specifically to comply with this Court's decision in *Tulee v. Washington*, 315 U.S. 681 (1942), which provides that Indians are subject to such regulatory actions in many instances, provided that they are charged a fee for the exercise of the underlying Treaty reserved right (here the reserved right to highway travel, in *Tulee*, the reserved right to take fish):

> The appellant, on the other hand, claims that the treaty gives him an unrestricted right to fish in the "usual and accustomed places", free from state regulation of any kind. We think the state's construction of the treaty is too narrow and the appellant's too broad; **that while the treaty leaves the state with power to impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here.**
>
> *Tulee* at 684. [Emphasis added]

Here, the United States may regulate highway use in a manner to conserve the highways, such as limiting tonnage, and Petitioner must comply, but he cannot, under his Treaty, be required to pay the taxes in question.

## III. PETITIONER HAS NEVER ARGUED THAT THE TERM "IN COMMON WITH" RESERVED THE RIGHTS HERE AT ISSUE.

Again, the United States, at Pages 10 and 11, mischaracterizes Petitioner's arguments in an effort to discredit his true position.

First, the assertion that Petitioner makes such an argument here, completely ignores the history of this case and the companion cases of *Cree v. Waterbury* and *Cree v. Flores*. In the original *Cree* case, the District Court, *Cree v. Waterbury*, 873 F.Supp 404 (E.D.Wash 1994), found that the term "in common with" guaranteed free travel rights to the Yakamas. The Ninth Circuit, on appeal, specifically held that the term "in common with" did not of itself guarantee such rights, and remanded the case to the District Court for a factual inquiry into the meaning of *all* of Article III, Paragraph 1, of the Treaty to determine its meaning:

> It is true that in each case, the Supreme Court held that the parties could not have intended the Treaty to allow Yakama Indians to retain no greater rights than non-Indian citizens. *However, the district court erred in holding that these cases* ***defined*** *the term "in common with" to mean that no fees could be charged for the exercise of a Treaty right.*
>
> *Cree v. Waterbury*, 78 F.3d 1400 at 1403. [Emphasis added]

As a result of that conclusion, the Circuit remanded the case to the District Court with instructions to conduct a factual inquiry inquiring as to the meaning of the Treaty as a whole in order to determine the meaning and the Indians' understanding of the terms "The right, in common with citizens of the United States, to travel upon all public highways." *Id.* at 1405.

Petitioner followed the mandate of the Circuit and retried the case as directed, leading to the holdings in *Cree v. Flores*, 955 F.Supp. 1224 (E.D.Wash 1997), and *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998). In the *Flores* case, the issue was the interpretation of the Yakama Treaty *as a whole*, including all of the terms of Article III, Paragraph 1. As the Petitioner sets forth, the District Court in *Ramsey v. United States*, followed that decision and applied that interpretation. Petitioner requests that the Court

disregard the government's incorrect statement of Petitioner's argument.

## IV. THE PETITIONER'S ARGUMENT REGARDING THE TERM "IN COMMON WITH" HAS ALWAYS BEEN TIED TO THE LANGUAGE PRECEDING AND FOLLOWING IT IN ARTICLE III, PARAGRAPH 1, "AS ALSO *THE RIGHT* IN COMMON WITH CITIZENS . . . *TO TRAVEL UPON ALL PUBLIC HIGHWAYS.*"

The United States ignores the Treaty term "right . . . to travel upon all public highways" in its argument, instead insisting that Petitioner relied only upon the "in common with" term. The Petitioner, at Page 21, states that "Here the issue is the 'right to travel . . . public highways'." Petitioner, in his argument, rather than relying on the "in common with" language as creating a right, instead has consistently adopted the interpretation used by this Court in the virtually identical language of Article III, Paragraph 2:

> It is true that the words 'in common with' may be read either as nothing more than a guarantee that individual Indians would have the same right as individual non-Indians or as securing an interest in the fish runs themselves. . . . **But we think greater importance should be given to the Indians' likely understanding of the other words in the treaty and especially the reference to the 'right of *taking* fish' – a right that had no special meaning at common law but that must have had obvious significance to the tribes relinquishing a portion of their pre-existing rights to the United States in return for this promise.**
>
> *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 677-78 (1979). [Emphasis added]

Clearly, the term "The right . . . to travel public highways" contained in the same Treaty Article and written

by the same scrivener should be treated in the same manner. Again, the United States ignores this Court's past decisions in asserting that Article III, Paragraph 1, by the use of the term "in common with," reserved no greater rights to the Yakamas than it did to non-Indians.

## V. THE UNITED STATES IGNORES THE PRECEDENTS OF THIS COURT INTERPRETING ARTICLE III OF THE YAKAMA TREATY AS RESERVING SPECIAL RIGHTS TO THE YAKAMAS.

At Pages 9 and 10 of its Brief in Opposition, the United States asserts that Article III, Paragraph 1, provides the Yakamas no "right superior" to any other citizen using the public highways. This argument directly contradicts the position of the United States in every case in which rights retained "in common" for the Yakamas has been interpreted.

Beginning in 1905, this Court recognized that the use of "in common," where coupled with a reserved right – there the "right of taking fish," and here the "right . . . to travel upon all public highways" – must be interpreted as the Indians understood the entire term, and reflected that Article III secured greater rights than the ordinary language of the Treaty provided:

> The remarks of the court clearly stated the issue and the grounds of decision. The contention of the respondents was sustained. In other words, it was decided that the Indians acquired no rights but what any inhabitant of the territory or state would have. **Indeed, acquired no rights but such as they would have without the treaty. This is certainly an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the nation for more.**
>
> *United States v. Winans*, 198 U.S. 571, 380. [Emphasis added]

This interpretation of Article III of the Yakama Treaty has been consistent in every case in which this Court has considered it.[1] This Court's latest interpretation of Article III's inclusion of the term "in common with," holds that it must be read in light of the Indians' understanding of that term and in conjunction with the other words included with it:

> It is true that the words "in common with" may be read either as nothing more than a guarantee that individual Indians would have the same right as individual non-Indians or as securing an interest in the fish runs themselves. . . .
>
> But we think greater importance should be given to the Indians' likely understanding of the other words in the treating and especially the reference to the "right of *taking* fish" – a right that had no special meaning at common law *but that must have had obvious significance to the tribe relinquishing a portion of their pre-existing rights to the United States in return for this promise.*
>
> *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, at 677, 678. [Emphasis added]

Here, the Yakamas agreed to go on the Reservation, but specifically reserved this right to travel the public highways in the same manner they reserved their right to fish – free of taxes, fees and regulations for the exercise of that right. Clearly the Circuit erred in refusing to follow this precedent and its decision must be reversed.

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[1] Seufert Bros. v. United States, 249 U.S. 194 (1919); Tulee v. Washington, 315 U.S. 681 (1942); *Passenger Fishing Vessel Ass'n, supra.*

## VI. THE YAKAMA TREATY MINUTES ARE REPLETE WITH REFERENCES TO THE YAKAMAS' USE OF THE ROADS AND RIGHT TO TRAVEL UPON ALL PUBLIC HIGHWAYS AS CONSIDERATION FOR THE YAKAMAS ACCEPTING THE TREATY.

At Pages 4 and 5 and footnote 4 of its brief, the United States asserts that the District Court in *Cree v. Flores*, 955 F.Supp. 1229, identified only *one* reference to travel in the Treaty Minutes, and implies that no other references exist. Again, this fails to reflect the extent of the record before the lower Courts as reflected in Petitioner's appendix. For instance, the District Court in the *Flores* opinion, *supra*, at Page 1244, recites at least four (4) specific instances where Governor Stevens and General Palmer promised the Yakamas that they would be allowed to use and go on the roads for purposes of trade, and the record in the *Ramsey* case below, as noted below, set forth seven (7) specific references to the use of roads by Stevens and Palmer. The *Ramsey* decision specifically relied upon the *Flores* ruling and its factual findings in this regard. In fact, Stevens advised the Yakamas that a major reason for the location of the Reservation was due to its proximity to "the great road":

> I will give briefly the reason for selection of these two reservations. . . .
>
> **You will be near the great road and can take your horses and your cattle down the river and to the Sound to market.** Though near to the great roads, you are a little off from them, and you will not be liable to be troubled by travelers passing through.
>
> *Id.* at 1244. [Emphasis added]

The specific references to all of these quotations from the Treaty Minutes are also found in Petitioner's appendix at Pages 184a-185a. They are contained in Petitioner's Eastern District of Washington Local Rule (b) Statement of Material Facts. The United States neither responded to

nor rebutted any of those facts. Under the local Rule, the factual assertions were therefore deemed admitted. Further, the District Court *Flores* decision, *supra*, (appendix 172a, 173a, findings 44-54), sets forth these promises regarding travel. The Court should not be misled by the opposition brief which fails to adequately or correctly describe the facts as they were before the District and Circuit Courts below.

## VII. *CHICKASAW NATION V. UNITED STATES*, 534 U.S. 84 (2001), DOES NOT DENIGRATE THE CANONS OF CONSTRUCTION AS THEY APPLY TO *TREATY RELATED* CLAIMS.

The United States argues that the holding in *Chickasaw* should lead this Court to provide lesser weight to the canons of construction in this case than may have occurred in the past. The United States omits any reference to a key portion of the holding it cited as its authority at Page 17 of its opposition. In *Chickasaw*, this Court was careful, in discussing the canons' use, to distinguish between interpretation of a statute and a Treaty:

> Nor can one say that the pro-Indian canon is inevitably stronger – particularly where the interpretation of a congressional statute rather than an Indian Treaty is at issue.
>
> *Id.* at 96.

As this case involves an issue of Treaty interpretation based on a Treaty negotiated in 1855 by non-English speaking Indians, not a casino gambling tax statute written in 1997, the Court clearly must consider the canons of construction to be applicable. In order to adhere to its long series of precedents involving interpretation of Article III of the Yakama Treaty, application of the canons here is both necessary and justified. The government's argument to the contrary should be ignored.

## VIII. THE REPLY BRIEF INCORRECTLY STATES THAT THE CIRCUIT DECISION IS NOT IN CONFLICT WITH OTHER CIRCUIT DECISIONS.

Petitioner refers the Court to the amicus brief filed by the Yakama Nation for a full decision of this issue. However, as that brief reflects, the Circuit's opinion is in conflict with holdings in the Third Circuit, *Lazore v. Commissioner of Internal Revenue Service*, 11 F.3d 1180 (8th Cir. 1993), and the Eighth Circuit, *Holt v. Commissioner of Internal Revenue*, 364 F.2d 38 (8th Cir. 1966).

## CONCLUSION

The United States' reply fails to fully discuss the record below, ignores this Court's long precedent for the use of the canons in Federal and State tax cases, and ignores the Circuit conflict. Clearly, this Court should grant the Petition in order to resolve this decision's conflict with this Court's decision and the decisions in the Third and Eighth Circuits.

Respectfully submitted,

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July 23, 2003